STATE OF MICHIGAN

COURT OF APPEALS

SHELLY SCHELLENBERG and DAVID RIGGLE, Petitioners-Appellants, v COUNTY OF LEELANAU, Respondent-Appellee.	UNPUBLISHED September 11, 2014 No. 316363 Tax Tribunal LC No. 00-448880

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Petitioners, Shelly Schellenberg and David Riggle, appeal as of right an order of the Michigan Tax Tribunal (MTT) that upheld respondent's determination that petitioners were not allowed to claim the principal residence exemption (PRE) on property owned in Suttons Bay, Michigan for the tax years 2009, 2010, 2011, and 2012. We reverse and remand.

I. BASIC FACTS

Petitioners, a married couple, owned the subject property at 3730 S. Lee Point Rd., Suttons Bay, Michigan. The property contained a main residence home (1196 sq. ft.) and a detached smaller garage/accessory apartment (385 sq. ft.). Petitioners marketed the garage/accessory apartment as "BayWatch Cottage" or "Grandma's Cottage" and rented it out during the relevant tax years.

Petitioners claimed the PRE on their property from the time they purchased the property in 1997 until they sold it in November 2012. Respondent denied the PRE for the 2009-2012 tax years and gave two reasons: (1) "The owner is not a Michigan resident" and (2) "Other: Two Dwellings; Rental."

After respondent issued its denial of the PRE, petitioners appealed to the MTT. Petitioners took exception with how respondent did not offer any arguments or theories and instead just submitted its exhibits to the MTT with no explanation for how the exhibits were relevant; they claimed that this prevented them from addressing, disputing, or rebutting any arguments. Petitioners also claimed that, with the evidence they provided, it was clear that Schellenberg resided at the Suttons Bay property during the relevant tax years. Further, petitioners argued that they did not rent out their primary residence during this period except for

13 days in 2012. Finally, petitioners claimed that the denial of the PRE constituted a targeted enforcement of the laws, which deprived them of equal protection and uniform taxation under the statute and constitution because other similarly situated houses, all within three miles, got 100% PRE even though they also have guest house properties.

Petitioners conceded that in 2009, Riggle started working on a project in Florida and did not spend much time in Michigan after that. This was acknowledged by petitioners checking both "resident" and "non-resident" on their joint Michigan income tax forms for the relevant tax years. Further, Schellenberg stated in an affidavit that she continued to use the Suttons Bay property as her primary residence during this time. Schellenberg also submitted many other pieces of evidence to support her claim that she used the property as her primary residence, including, *inter alia*, pictures, receipts, bills, voting records, verification of doctor appointments, and her business records that used the Suttons Bay address.

Respondent submitted many exhibits to the tribunal also, but it did not submit an accompanying brief or statement. Thus, the relevance of many of those exhibits is not readily apparent. For example, respondent submitted copies of petitioners' real estate listings for the property when they eventually put it on the market, but it is not clear how the listings proved or disproved that petitioners were not entitled to the PRE.[1]

But the most salient document respondent submitted was a response by the Department of Treasury to a request made by respondent regarding the residency status of petitioners. The answer supplied by the Department of Treasury on September 6, 2012, showed that after its review, petitioners filed as nonresidents for the tax years in question. However, petitioners noted that the information in the form was incorrect and got the Department of Treasury to supply a revised form in January 2013 that clarified that while *Riggle filed as a nonresident* from 2009 through 2011, *Schellenberg filed as a resident*.[2]

A referee held a hearing and held as follows:

> Based on all evidence submitted, Petitioner's husband is filing as a nonresident for the 2009 and 2010 tax years[;] Petitioner has failed to introduce any income tax returns for the 2011 and 2012 tax years or any other evidence that

[1] Highlighted portions (presumably highlighted by respondent) of the listings stated, "Two houses, the main house is directly ON the bay, guest house also has a fabulous view of W Bay" and "This is a legal non-conforming property 3.4 private acres with two houses, high quality construction, the executive main house is directly ON West Grand Traverse Bay & house "grandma's cottage" on the N. side of Lee Point."

[2] Petitioners explain that the Treasury was unable to offer any view on the filing status for 2012 because the 2012 tax forms did not exist and were not filed as of the date of the Department of Treasury's updated response in January 2013, nor were they in existence at the time of the referee hearing in March 2013.

would indicate that the Petitioner and husband filed as residents of the State of Michigan. Therefore, Petitioner is not entitled to a PRE for the tax years at issue.

Further, even if Petitioner were entitled for PRE she would not be entitled for 100% exemption as there is a second dwelling on the subject property. The second dwelling is habitable as stipulated by the Petitioner and the property was being rented. Respondent testified that the subject would have received a 74% exemption, which is based on the value of the two dwellings. Petitioner has argued that [MCL] 211.7dd(c) applies, as the second dwelling has been rented/leased as a residence and is less than 50% of the total square footage of the main house. However, [MCL] 211.7dd(c) does not apply here as contended[;] it only applies when only one home is involved and more than 50% of the one home has been rented. Here we have two dwellings.

The MTT entered an order adopting the referee's proposed opinion and judgment, and petitioners appeal from that order.

II. STANDARD OF REVIEW

Our review of decisions by the MTT is very limited. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012). "Unless fraud is alleged, an appellate court reviews the decision for a 'misapplication of the law or adoption of a wrong principle.'" *Podmajersky v Dep't of Treasury*, 302 Mich App 153, 162; 838 NW2d 195 (2013), quoting *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008). "The tribunal's factual findings will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record." *Mich Props*, 491 Mich at 499 (quotation marks omitted).

However, issues of statutory interpretation are reviewed de novo. *Podmajersky*, 302 Mich App at 162. The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). To ascertain the Legislature's intent, we look to the language in the statute and give the words their plain and ordinary meanings. *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 246; 801 NW2d 629 (2010). If the statute's language is not ambiguous, this Court will enforce the statute as written. *Ford Motor*, 475 Mich at 438-439.

III. ANALYSIS

A.

Petitioners first argue that the MTT erred as a matter of law because Michigan law does not require both spouses to be residents in order for one spouse to claim the PRE. Respondent acknowledges that the MTT erred on this basis, and we agree.

The MTT adopted the opinion of the referee, which stated:

Based on all evidence submitted, Petitioner's husband is filing as a nonresident for the 2009 and 2010 tax years[;] Petitioner has failed to introduce

> any income tax returns for the 2011 and 2012 tax years or any other evidence that would indicate that the Petitioner and husband filed as residents of the State of Michigan. Therefore, Petitioner is not entitled to a PRE for the tax years at issue.

Thus, it is clear that the reason the MTT upheld the denial of the PRE is because both spouses were not residents. However, as all parties now acknowledge, there is no such requirement.

"Michigan's principal residence exemption, also known as the 'homestead exemption,' is governed by §§ 7cc and 7dd of the General Property Tax Act, MCL 211.7cc and MCL 211.7dd." *Drew v Cass Co*, 299 Mich App 495, 500; 830 NW2d 832 (2013) (quotation marks omitted). MCL 211.7cc provides, in pertinent part:

> (1) A principal residence is exempt from the tax levied by a local school district for school operating purposes to the extent provided under . . . MCL 380.1211, if *an owner* of that principal residence claims an exemption as provided in this section. . . .
>
> * * *
>
> (3) Except as otherwise provided in subsection (5), a husband and wife who are required to file or who do file a joint Michigan income tax return are entitled to not more than 1 exemption under this section. For taxes levied after December 31, 2002, *a person* is not entitled to an exemption under this section if any of the following conditions occur:
>
> (a) *That person* has claimed a substantially similar exemption, deduction, or credit on property in another state that is not rescinded.
>
> (b) Subject to subdivision (a), *that person or his or her spouse* owns property in a state other than this state for which *that person or his or her spouse* claims an exemption, deduction, or credit substantially similar to the exemption provided under this section, unless *that person and his or her spouse* file separate income tax returns.
>
> (c) *That person* has filed a nonresident Michigan income tax return, except active duty military personnel stationed in this state with his or her principal residence in this state.
>
> (d) *That person* has filed an income tax return in a state other than this state as a resident, except active duty military personnel stationed in this state with his or her principal residence in this state.
>
> (e) *That person* has previously rescinded an exemption under this section for the same property for which an exemption is now claimed and there has not been a transfer of ownership of that property after the previous exemption was rescinded, if either of the following conditions is satisfied:

(*i*) *That person* has claimed an exemption under this section for any other property for that tax year.

(*ii*) *That person* has rescinded an exemption under this section on other property, which exemption remains in effect for that tax year, and there has not been a transfer of ownership of that property. [Emphasis added.]

Nowhere in the above statutory scheme is there a requirement that both spouses must be residents in order for one to claim the PRE. On the contrary, the use of the terms "an owner" and "that person," while referencing any spouse separately, makes it clear that the Legislature was treating the one claiming the exemption (i.e., "that person") separate from any spouse. Here, respondent presumably was relying on subsection (c) in denying the PRE because both petitioners did not file as residents in their joint Michigan income tax forms. However, subsection (c) only prohibits "the person" from claiming the PRE to have filed as a nonresident. Thus, Schellenberg, who filed as a Michigan resident would not be precluded from claiming the exemption under subsection (c).

Therefore, the MTT committed an error of law when it required both spouses to be residents in order for any spouse to claim the PRE, and we reverse on this basis.

Respondent claims that a remand is necessary in order for the MTT to make a discrete factual determination of whether Schellenberg was a resident of Michigan during the relevant tax years. It is a close call whether there is a question of fact on this issue; petitioners submitted voluminous, compelling evidence to suggest that she did reside at the Suttons Bay home during the tax years in question, which respondent only marginally rebutted.[3] But, because, as discussed later in this opinion, a remand is necessary in any case, we believe it best for the tribunal to make this determination.

Therefore, on remand, the tribunal is to determine whether Schellenberg used the Suttons Bay property as her "principal residence" during the relevant tax years. "Principal residence" is defined, in pertinent part, in MCL 211.7dd(c) as meaning

> the 1 place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established.

We caution the tribunal that the fact that Schellenberg admittedly spent time in Florida for some portions of the years, while relevant, is not dispositive. Likewise, the fact that she may have earned money in Florida also is not dispositive of whether she "intends to return" to her "true, fixed, and permanent home" in Suttons Bay.

[3] We note that most of the evidence submitted by respondent to the tribunal was wholly irrelevant for this purpose.

B.

Petitioners also argue that the denial of the PRE was a violation of the constitutional protections against unequal treatment of similarly situated taxpayers. In its opinion, the MTT stated that even if it did not deny the PRE outright, it would have only awarded a portion of the PRE:

> Further, even if Petitioner were entitled for PRE she would not be entitled for 100% exemption as there is a second dwelling on the subject property. The second dwelling is habitable as stipulated by the Petitioner and the property was being rented. Respondent testified that the subject would have received a 74% exemption, which is based on the value of the two dwellings. Petitioner has argued that [MCL] 211.7dd(c) applies, as the second dwelling has been rented/leased as a residence and is less than 50% of the total square footage of the main house. However, [MCL] 211.7dd(c) does not apply here as contended[;] it only applies when only one home is involved and more than 50% of the one home has been rented. Here we have two dwellings.

Petitioners claim that several other properties in the vicinity were allowed to claim 100% PRE even though they also have a second, rental house on the property. Petitioners aver that this unequal treatment is a result of animus from the litigious history between the parties.

We agree with the MTT's contention that the fact that the rental cottage was less than 50% of the size of the main house is not pertinent. MCL 211.7dd(c) provides that a "principal residence also includes any portion of a dwelling or unit of an owner that is rented or leased to another person as a residence as long as that portion of the dwelling or unit that is rented or leased is less than 50% of the total square footage of living space in that dwelling or unit." Because the statute refers to renting a "portion of *a* dwelling or unit of an owner" we agree that it is pertaining to a single unit or dwelling that is being partially rented. Here, that is not the case because there are two distinct dwellings.

However, we are troubled by the MTT's lack of any citation to any authority for potentially imposing a 74% PRE. Arguably, the MTT was relying on another portion of MCL 211.7dd(c) that states that a "[p]rincipal residence includes only that portion of a dwelling . . . that is subject to ad valorem taxes and that is owned *and occupied by an owner* of the dwelling . . . ." (Emphasis added.) But without any reference to what statute it was relying on, we are left to speculate. We note that it is inadequate for the MTT to simply rely on the mere fact that "[r]espondent testified that the subject would have received a 74% exemption." We note that it is the tribunal's responsibility to apply the correct law. It also is noteworthy that the same opinion notes that respondent also (erroneously) "testified that both parties (husband and wife) have [to] be residents of Michigan in order to qualify for a PRE." Thus, it is clear that relying on respondent's testimony (or any party's testimony, for that matter) and simply adopting its view regarding the state of the law is ill-advised.

Now, turning our attention to petitioners' claim of unequal treatment, this Court has stated that "[t]o comply with the Equal Protection Clause of the United States Constitution, US Const, Am XIV, and the Uniformity of Taxation Clause of the Michigan Constitution, Const

1963, art 9 § 3, defendant is required to exercise 'equal treatment of similarly situated taxpayers." *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 538; 831 NW2d 255 (2013), quoting *Armco Steel Corp v Dep't of Treasury*, 419 Mich 582, 592; 358 NW2d 839 (1984). A complaining taxpayer has the burden of establishing that the taxing authority "failed to treat similarly situated enterprises equally and 'that its failure to do so was intentional and knowing, rather than mistaken or the result of inadvertence." *Lear Corp*, 299 Mich App at 538, quoting *MCI Telecom Corp v Dep't of Treasury*, 136 Mich App 28, 36-37; 355 NW2d 627 (1984). The taxing authority, conversely, "is only required to show a rationale basis for its decision." *Lear Corp*, 299 Mich App at 538.

The tribunal did not address petitioners' claim, and because of that, there is insufficient information in the record for us to adequately review this issue. Petitioners submitted evidence of many other similarly situated properties, all of which were located within three miles of their house and had distinct rental properties and yet were still allowed to claim 100% PRE. It appears that respondent did not argue against this charge or offer any testimony or evidence to show that, if the allegations were true, it had a rationale basis to only reduce the PRE for respondents. Thus, on remand, if the tribunal does determine that Schellenberg used the Suttons Bay home as her principal residence during the relevant tax years and it imposes a PRE of less than 100%, it needs to address petitioners' claim that the alleged disparate treatment is unconstitutional.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello